No. 22032

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

F. E. SMITH and V. K. SMITH,

Appellants

v.

NEAL S. WARREN, as District Director of Internal Revenue for Washington,

Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEE

MITCHELL ROGOVIN
Assistant Attorney General.

LEE A. JACKSON,
MEYER ROTHWACKS,
EDWARD LEE ROGERS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:

EUGENE CUSHING,
United States Attorney.

ALBERT E. STEPHAN,
Assistant United States Attorney

BALLARD PRINTING AND PUBLISHING, SEATTLE, WASHINGTON — 10/26/67 — 50 COPIES

No. 22032

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

F. E. SMITH and V. K. SMITH,

Appellants

v.

NEAL S. WARREN, as District Director of Internal Revenue for Washington,

Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEE

MITCHELL ROGOVIN
Assistant Attorney General.

LEE A. JACKSON,
MEYER ROTHWACKS,
EDWARD LEE ROGERS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:

EUGENE CUSHING,
United States Attorney.

ALBERT E. STEPHAN,
Assistant United States Attorney

BALLARD PRINTING AND PUBLISHING, SEATTLE, WASHINGTON — 10/26/67 — 50 COPIES

INDEX

Page

OPINION BELOW 1

JURISDICTION 1

QUESTION PRESENTED 2

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT 3

SUMMARY OF ARGUMENT 7

ARGUMENT:

The transportation expenses incurred by taxpayer in traveling between his residence and Seattle were non-deductible commuting expenses 8

A. Since the expenses involved here were incurred in commuting between the taxpayer's residence and Seattle, his principal place of business, they are non-deductible personal expenses 8

B. The Fifth Circuit's decisions in *Heuer* v. *Commissioner* and *Steinhort* v. *Commissioner* support the position of the District Director here; the District Court decision in *Hulme* v. *United States* is distinguishable and, moreover, may be erroneous 17

CONCLUSION 27

CERTIFICATE 27

APPENDIX 28

CITATIONS

Cases:

Automobile Club of Michigan v. *Commissioner*, 353 U.S. 180 25

Barnhill v. *Commissioner*, 148 F. 2d 913 12

Bell v. *Commissioner*, 13 T.C. 344 10

CASES (*Continued*)

Page

Bradley v. *Commissioner*, 324 F. 2d 610, affirming 39 T.C. 652 20

Cammarano v. *United States*, 358 U.S. 498 12

Chandler v. *Commissioner*, 226 F. 2d 467 ..... 10, 12

Commissioner v. *Bagley*, 374 F. 2d 204 ..... 9, 10

Commissioner v. *Duberstein*, 363 U.S. 278 13

Commissioner v. *Flowers*, 326 U.S. 465 ..... 11, 17

Commissioner v. *South Texas Co.*, 333 U.S. 496 12

Commissioner v. *Stidger*, 386 U.S. 287, reversing 355 F. 2d 294 9

Correll v. *United States*, 369 F. 2d 87 9

Crowther v. *Commissioner*, 269 F. 2d 292 ..... 24, 25

Duncan v. *Commissioner*, 17 B.T.A. 1088, affirmed *per curiam*, 47 F. 2d 1082 10

England v. *United States*, 345 F. 2d 414, certiorari denied, 382 U.S. 986 20

Flowers v. *Commissioner*, decided August 7, 1944 (P-H Memo T.C., par. 44,263), reversed, 148 F. 2d 163, reversed, 326 U.S. 465 17

Green v. *Commissioner*, 35 T.C. 764, affirmed, 298 F. 2d 890 ..... 13, 17

Hayes v. *Commissioner*, decided June 8, 1966 (P-H Memo T.C., par. 66,123) 20

Helvering v. *Winmill*, 305 U.S. 79 12

Heuer v. *Commissioner*, 32 T.C. 947 15

Heuer v. *Commissioner*, 283 F. 2d 865, affirming *per curiam*, 32 T.C. 947 ..... 11, 17, 18, 19, 22, 24, 25

Hulme v. *United States*, decided June 3, 1965 (16 A.F.T.R. 2d 5084) 21, 22, 23, 24

James v. *United States*, 308 F. 2d 204 9

Koons v. *United States*, 315 F. 2d 542 ..... 20, 21

Loflin v. *Commissioner*, decided March 8, 1967 (19 A.F.T.R. 2d 1091) 20

Mathews v. *Commissioner*, 310 F. 2d 98 24

CASES (*Continued*)

Page

Meier v. *Commissioner*, 199 F. 2d 392 14

Pederson v. *Commissioner*, 46 T.C. 155 20

Peurifoy v. *Commissioner*, 358 U.S. 59 13

Podems v. *Commissioner*, 24 T.C. 21 10

Rice v. Riddell, 179 F. Supp. 576 24

Sherman v. *Commissioner*, 16 T.C. 332 12

Steinhort v. *Commissioner*,
335 F. 2d 496 ..... 10, 11, 12, 15, 17, 18, 19, 21, 22, 24, 25

Sullivan v. *Commisioner*, 1 B.T.A. 93 ..... 10, 11

Summerour v. *Allen*, 99 F. Supp. 318 10

United States v. *Mathews*, 332 F. 2d 91 13

United States v. *Woodall*, 255 F. 2d 370, certiorari
denied, 358 U.S. 824 ..... 20, 21

Winn v. *Commissioner*, 32 T.C. 220 10

Wright v. *Hartsell*, 305 F. 2d 221 12

Statutes:

Internal Revenue Code of 1939:

Sec. 22 (26 U.S.C. 1952 ed., Sec. 22) 10

Sec. 23 (26 U.S.C. 1952 ed., Sec. 23) 11

Internal Revenue Code of 1954:

Sec. 62 (26 U.S.C. 1964 ed., Sec. 62) 9, 28

Sec. 120 (26 U.S.C. 1952 ed., Supp. IV, Sec. 120) 25

Sec. 162 (26 U.S.C. 1964 ed., Sec. 162 .....2, 9, 10, 11, 21

Sec. 217 (26 U.S.C. 1964 ed., Sec. 217) 20

Sec. 262 (26 U.S.C. 1964 ed., Sec. 262) 11, 19, 29

Revenue Act of 1918, c. 18, 40 Stat. 1057,
Sec. 214 9

Revenue Act of 1921, c. 136, 42 Stat. 227,
Sec. 214 9

CASES (*Continued*)

Page

Revenue Act of 1924, c. 234, 43 Stat. 253,
Sec. 214 11

Revenue Act. of 1926, c. 27, 44 Stat. 9,
Sec. 214 11

Revenue Act of 1928, c. 852, 45 Stat. 791,
Sec. 23 11

Revenue Act of 1932, c. 209, 47 Stat. 169,
Sec. 23 11

Revenue Act of 1934, c. 277, 48 Stat. 680,
Sec. 23 11

Revenue Act of 1936, c. 690, 49 Stat. 1648,
Sec. 23 11

Revenue Act of 1938, c. 289, 52 Stat. 447,
Sec. 23 11

MISCELLANEOUS

Page

H. Rep. No. 749, 88th Cong., 2d Sess., p. A58 (1964-1 Cum. Bull. (Part 2) 125, 306) 20

9 Mertens, Law of Federal Income Taxation (Rev.), Sec. 50.59 fn. 88 13

Rev. Rul. 63-100, 1963-1 Cum. Bull. 34 24

S. Rep. No. 1983, 85th Cong., 2d Sess., p. 14 (1958-3 Cum. Bull. 922,) 25

Treasury Regulations 45, Art. 292 9

Treasury Regulations 62, Art. 101(a) 11

Treasury Regulations 65, Art. 102 11

Treasury Regulations 69, Art. 102 11

Treasury Regulations 74, Art. 122 11

Treasury Regulations 77, Art. 122 11

Treasury Regulations 86, Art. 23(a)-2 11

Treasury Regulations 94, Art. 23(a)-2 11

Treasury Regulations 101, Art. 23(a)-2 11

Treasury Regulations 103, Sec. 19.23(a)-2 11

Treasury Regulations 111, Sec. 29.23(a)-2 11

Treasury Regulations 118, Sec. 39.23(a)-2 11

Treasury Regulations on Income Tax:

Sec. 1.62-1 (26 C.F.R., Sec. 1.62-1) 9, 11, 29

Sec. 1.162-2 (26 C.F.R., Sec. 1.162-2) 11, 30

Sec. 1.262-1 (26 C.F.R., Sec. 1.262-1) 11, 30

No. 22032

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

F. E. SMITH and V. K. SMITH,

Appellants

v.

NEAL S. WARREN, as District Director of Internal Revenue for Washington,

Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEE

OPINION BELOW

The findings of fact and opinion of the District Court are not officially reported.

JURISDICTION

This appeal involves federal income taxes for the years 1960 and 1961. The taxes in dispute were paid on June 24, 1964. (I-R. 20, 26.) Claims for refund were filed on May 27, 1965 (I-R. 20, 26), and were partially rejected on January 26, 1966 (I-R. 13-19). Within the time provided in Section 6532 of

the Internal Revenue Code of 1954, and on July 28, 1966, the taxpayer brought this action against the District Director for recovery of the taxes paid.[1] (I-R. 1-19.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1340. The judgment of the District Court was entered on March 23, 1967. (I-R. 31.) Within sixty days thereafter, on May 16, 1967, a notice of appeal was filed. (I.-R. 34.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

The taxpayer, a Puget Sound ship pilot, incurred automobile expenses in traveling between his residence and Seattle, where he performed pilotage assignments. The question presented is whether those expenses constitute deductible business transportation expenses pursuant to Section 162(a) of the 1954 Code or non-deductible commuting expenses under Code Section 262.

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are set out in the Appendix, *infra*.

---

[1] The taxes in issue are limited to those set forth in the pre-trial order. (I-R. 27, 44-45.)

STATEMENT

The facts, as found by the District Court, are summarized as follows:

Taxpayers, husband and wife, during the tax period in question were residents of the Northern King County, Camano Island, and Edmonds, Washington. They filed timely joint income tax returns for the years 1960 and 1961 with the defendant, Neal S. Warren, District Director of Internal Revenue for the State of Washington. (I-R. 25-26.)

Taxpayer[2], a Puget Sound pilot, has a federal license issued by the United States Coast Guard as a first class pilot on Puget Sound and adjacent inland waters, and has a Master for steam and/or motor vessels of any tonnage on any ocean. Taxpayer is a member of Local No. 8 of International Organization of Masters, Mates and Pilots. He is also a member of the Puget Sound Pilots Association, also known as Puget Sound Pilots, and except for a small amount of interest, all of taxpayer's income reported during the years in issue was earned through this association. (I-R. 27.)

The Puget Sound Pilots Association is an organ-

---

[2] Since a joint income tax return was filed by husband and wife, both are appellants here. In this brief, however, the term "taxpayer" refers only to the husband.

ization of approximately thirty members who pilot ships in the Puget Sound area. The fees charged for these services are regulated by state law. The area covered by the Association is the American waters east of Port Angeles, Washington, and includes Marsh Point (Anacortes), 85 miles north of Seattle; Ferndale, 105 miles north of Seattle, and Olympia, 60 miles south of Seattle, as well as Edmonds and Mukilteo, which are closer to Seattle than are the other ports. (I-R. 27-28.)

The Puget Sound Pilots Association maintains a communication and dispatching office in the Exchange Building in downtown Seattle. Requests for pilots are received from ship owners or agents at this office. The Association dispatcher then notifies the pilot whose name is next on the duty roster. This office also prepares and mails all statements for fees, collects all accounts receivable and pays all operating expenses. A conference room for pilots' meetings is maintained at the Exchange Building office. In addition, the Association also owns a pilot station on Ediz Hook, located near Port Angeles. This station is equipped with two pilot boats, a communications center and facilities for food and lodging. It is from this station that a pilot embarks on and disembarks from ships arriving from and departing to sea. (I-R. 28.)

In addition to these Association services and facilities, taxpayer maintains an office in his home. In this residential office taxpayer spent time reviewing various written materials in regard to his duties as a Puget Sound ship pilot; in this connection, he received and reviewed materials in regard to Puget Sound waters and docking facilities. The materials maintained and received are described as charts, Army Engineer blueprints, current and tide tables, light lists, notices to mariner, port series, Coast Pilot, and radar books. (I-R. 28.) The Puget Sound Pilots Association[3] dispatcher also notified taxpayer of his pilot assignments on his residential telephone. During the years involved, taxpayer's residence in which this office was maintained was centrally located as to taxpayer's various assignments [4]. Taxpayer claimed an allocable share of his home expenses, including depreciation, as ordinary and necessary business expenses, and these expenses were allowed by the District Director (I-R. 28-29.)

Depending upon the particular assignment in-

---

[3] Hereinafter referred to as the "Pilots Association" or "Association".

[4] During the years involved, taxpayer moved his residence from North King County, apparently a suburb of Seattle, to Camano Island, and then to Edmonds, located approximately seventeen miles from Seattle. (II-R. 16, 66.)

In light of taxpayer's various residential locations, then, the parties' stipulation that his residences were "centrally located" as to assignments (II-R. 22) presumably was intended to mean that taxpayer resided geographically well within—rather than on the periphery of—the general Puget Sound area where he received his assignments. In this connection, it should be noted that Seattle is also centrally located among those assignment ports (Ex. 2).

volved, taxpayer may report for duty either at some pier along the central Seattle waterfront (an area of approximately three and one-half to four statutory miles) or some other pier along Puget Sound which is outside the central Seattle waterfront. (I-R. 29.) The taxpayer provided his own transportation to, from, and between work assignments, using both his private automobile and public transportation[5]. While taxpayer was on rotation, he was on call to furnish piloting service twenty-four hours a day. (I-R. 29.)

Taxpayer has claimed as income tax deductions all expenses which he incurred in reporting for his assignments as a pilot for ships. The expenses which taxpayer incurred in traveling between his home and assignments as a pilot for ships located at a pier other than one on the central Seattle waterfront were allowed as income tax deductions by the District Director and are not in issue here. The District Director disallowed those expenses which taxpayer incurred in traveling between his home and the central Seattle

---

[5] According to taxpayer's testimony, his wife drove him in their private automobile to and from assignments in Seattle and also to and from several other areas, some of which were apparently not readily accessible by public transportation. In certain other instances his wife drove him to and from the appropriate bus depot, e.g., in Seattle, where the taxpayer would take a bus to and from assignments in other ports. In some instances, it may not have been practical for taxpayer to drive his car to a port city and park it because before returning home he might receive an assignment in another port city where public transportation was not readily available back to where his car would have been parked. (I-R. 29; II-R. 26-28.) The only transportation expenses disallowed by the District Director were for trips between the central Seattle waterfront and the taxpayer's residence. (I-R. 29, 30.)

waterfront as non-deductible personal expenses. (I-R. 29.) The District Director's determination was upheld by the District Court. (I-R. 30.) This appeal followed. (I-R. 34.)

SUMMARY OF ARGUMENT

It has long been established that the costs incurred in commuting between a taxpayer's residence and his job are non-deductible personal expenses. Taxpayer, a ship pilot, when traveling between his home and the central Seattle waterfront, where he reported for pilotage assignments, was not different from the ordinary suburb-to-city commuter. Accordingly, the transportation costs arising out of his trips to and from Seattle were non-deductible personal expenses.

Taxpayer's argument that the office in his residence was his principal place of business and, therefore, that he did not commute to Seattle, is unsupported by the record. The economic life of the taxpayer was centered in Seattle. There he performed a substantial portion of his pilotage assignment; there he derived virtually all of his income; and there the Puget Sound Pilots Association, of which he was a member, carried on virtually all of the commercial aspects of the business of providing pilotage service. Taxpayer's activities in his residential office were concerned primarily with maintaining—through reading and study—his

professional skills as a ship pilot, a profession he carried on primarily at the Seattle port and, to a lesser extent, at other ports to which he was assigned. His residential office activities are similar to the comparable studies pursued in their homes by other professional people, e.g., doctors and lawyers, who, like the taxpayer here, commute to, and carry on their professions at, their downtown offices or elsewhere outside their homes. Accordingly, the District Court's finding that taxpayer was simply commuting to and from Seattle, where he pursued his business, and his home is not clearly erroneous.

ARGUMENT

THE TRANSPORTATION EXPENSES INCURRED BY TAXPAYER IN TRAVELING BETWEEN HIS RESIDENCE AND SEATTLE WERE NON-DEDUCTIBLE COMMUTING EXPENSES

A. *Since the expenses involved here were incurred in commuting between the taxpayer's residence and Seattle, his principal place of business, they are non-deductible personal expenses.*

The question on this appeal is whether automobile transportation expenses—including amounts for depreciation, maintenance and operation—incurred by the taxpayer in traveling between his home and the central Seattle waterfront are non-deductible commut-

ing expenses or deductible business transportation expenses. Under Sections 62 and 162(a) of the 1954 Code, Appendix, *infra*, business transportation expenses are deductible from gross income to arrive at adjusted gross income—whether or not incurred "while away from home" within the meaning of Section 162(a) (2) of the Code [6]. Sec. 1.62-1(g) Treasury

---

[6] Accordingly, in the instant case, we are not relying on, or in any way concerned with, the controversial meaning of (Section 162(a) (2) "home" presented in *Commissioner* v. *Stidger*, 386 U.S. 287 (1967) reversing 355 F. 2d 294 (C. A. 9th, 1965). For that matter, even where it was assumed that the business transportation versus commuting expense question involved in the instant case was to be decided under the provisions of Section 162(a) (2), it was recognized that the dispute over the meaning of "home" need not necessarily be resolved. *Steinhort* v. *Commissioner*, 355 F. 2d 496, 503-504 (C. A. 5th, 1964). The primary question here is whether the taxpayer's principal place of business was located in Seattle or in his residence, not, as in *Stidger, supra*, whether his "home" should be considered to be located at his principal place of business.

It is the Commissioner's long-standing position that Section 162(a) (2), which allows the deduction of "traveling expenses", including amounts spent for meals and lodging as well as for transportation, applies only where a taxpayer incurs such expenses "while away from home" either overnight or to obtain sleep or rest. *Commissioner* v. *Bagley*, 374 F. 2d 204 (C. A. 1st, 1967), petition for certiorari pending (October, 1967, Term, No. 155); *Correll* v. *United States*, 369 F. 2d 87 (C. A. 6th, 1966), petition for certiorari granted June 12, 1967 (October, 1967, Term, No. 113); see also *James* v. *United States*, 308 F. 2d 204, 206-207 (C. A. 9th, 1962). While taxpayer here has not attempted to prove that his trips required him to obtain sleep or rest, he does not claim any meal or lodging expense deductions. (I-R. 26-27.) Accordingly, it is not necessary to determine here the validity of the Commissioner's sleep-or-rest rule under Section 162(a) (2), a question now pending before the Supreme Court in the *Correll* case, *supra*. Instead, the question here—under the general terms of Section 162(a)—is simply whether the expenses involved were (Section 162(a)) "ordinary and necessary expenses * * * incurred * * * in carrying on any trade or business" which, as hereafter discussed, turns on whether those expenses were incurred in traveling between two widely separated places of business, as taxpayer contends, or between his residence and his principal place of business, as we contend.

Indeed, as early as 1919, prior to the enactment of the original "traveling" expense provision, Section 214(a) (1) of the Revenue Act of 1921, c. 136, 42 Stat. 227, the Commissioner had recognized that business transportation expenses were deductible as "necessary" business expenses under Section 214 of the Revenue Act of 1918, c. 18, 40 Stat. 1057. Treasury Regulations 45 (1919 ed.) Art. 292. Due, however, to an apparent legislative oversight, from 1944 until the effective date of Section 62(2) (C), Appendix, *infra*, employees who chose the standard deduction could not deduct business expenses, including amounts spent on transportation, incurred in the course of their duties unless they were reimbursed by their employers or the expenses were incurred "while

Regulations on Income Tax (1954 Code), Appendix, *infra; Bell* v. *Commissioner*, 13 T. C. 344 (1949); *Duncan* v. *Commissioner*, 17 B.T.A. 1088 (1929), affirmed *per curiam*, 47 F. 2d 1082 (C. A. 2d, 1931 [7]); see *Sullivan* v. *Commissioner*, 1 B.T.A. 93 (1942); *Steinhort* v. *Commissioner*, 335 F. 2d 496, 504-505 (C.A. 5th, 1964) (and see the cases there cited). But commuting expenses—the transportation expenses incurred by a taxpayer in traveling between his residence and his principal place of business or employment—are

---

away from home". Internal Revenue Code of 1939, Section 22(n), as added by Section 8(a) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231. Therefore, employees using the standard deduction who were not reimbursed for transportation costs incurred on daily trips tried to deduct them as "traveling" expenses in determining adjusted gross income on which the standard deduction was computed. But the Commissioner, in applying his sleep-or-rest-rule, disallowed any such deductions based on one-day trips. Apparently to prevent such discrimination against employees, the courts anomalously allowed transportation expenses incurred on one-day trips to be deducted as "traveling" expenses while they, at the same time, denied deductions for the cost of meals on the same trips on the ground that the travel was not "away from home". See, e.g., *Winn* v. *Commissioner*, 32 T.C. 220, 224-225 (1959) (allowing transportation expense deductions but disallowing meal expense deductions on the same trips); *Summerour* v. *Allen*, 99 F. Supp. 318 (M.D. Ga., 1951) (meal expense deductions disallowed; transportation expense would have been allowed if amount spent away from home county had been proved); *Podems* v. *Commissioner*, 24 T.C. 21, 23 (1955); see also *Chandler* v. *Commissioner*, 226 F. 2d 467 (C. A. 1st, 1955); cf. *Commissioner* v. *Bagley*, 374 F. 2d, p. 208.

Apparently as a consequence of the litigation involving employees' attempts to deduct unreimbursed transportation expenses incurred on one-day trips, it has been generally assumed—as is evident from many of the cases cited herein—that the deductibility of transportation expenses is governed solely by Section 162(a) (2). While, as indicated *supra*, this is not the case, the distinction that has been drawn between deductible business transportation expenses and non-deductible commuting expenses by judicial and administrative interpretations of Section 162(a) (2) is essentially the same distinction that must be made in the instant case under the general terms of Section 162(a).

7 For example, in *Duncan, supra*, the meal and lodging expenses of an itinerant traveling salesman were held to be non-deductible personal expenses because not incurred while away from home (p. 1091), while his expenses for (p. 1092) "entertainment of customers, * * * railway and Pullman fares, and items of similar character" were allowed as business expenses to the extent that the Commissioner had determined that they had actually been incurred.

non-deductible personal expenses. Sec. 262, Appendix, *infra;* Secs. 1.62-1(g), 1.162-2(e) and 1.262-1(b) (5) of the Treasury Regulations on Income Tax (1954 Code), Appendix, *infra; Sullivan* v. *Commissioner, supra; Commissioner* v. *Flowers*, 326 U.S. 465 (1946); *Steinhort* v. *Commissioner*, 335 F. 2d 496, 503 (C. A. 5th, 1964) (and see the cases there cited); *Heuer* v. *Commissioner*, 283 F. 2d 865 (C. A. 5th, 1960), affirming *per curiam* 32 T.C. 947 (1959). Indeed, since 1922, the Commissioner's Regulations have provided that commuting expenses are not deductible as business expenses [8]. Since this regulatory provision has survived numerous statutory re-enactments [9], it must be regarded as having received implied Congressional approval. *Commissioner* v. *Flowers, supra*, pp. 469-470[10]; *Steinhort* v. *Commissioner, supra* p. 503; *Barnhill* v. *Commissioner*, 148 F. 2d 913 (C. A. 4th,

[8] See Treasury Regulations 62 (1921 Act), Art. 101 (a); Treasury Regulations 65 (1924 Act), Art. 102; Treasury Regulations 69 (1926 Act), Art. 102; Treasury Regulations 74 (1929 ed.), Art, 122; Treasury Regulations 77 (1932 Act), Art. 122; Treasury Regulations 86 (1934 Act), Art. 23(a)-2; Treasury Regulations 94 (1936 Act), Art. 23(a)-2; Treasury Regulations 101 (1938 Act), Art. 23(a)-2; Treasury Regulations 103 (1939 Code), Sec. 19.23(a)-2; Treasury Regulations 111 (1939 Code), Sec. 29-23(a)-2; Treasury Regulations 118 (1939 Code), Sec. 39.23(a)-2(i); Treasury Regulations on Income Tax (1954 Code), Secs. 1.62-1(g), 1.162-2(e) and 1.262-1(b) (5).

[9] See Revenue Act of 1924, c. 234, 43 Stat. 253; Sec. 214(a); Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 214(a); Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 23(a); Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 23(a); Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 23(a); Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 23(a); Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 23(a); Internal Revenue Code of 1939, Sec. 23(a) (26 U.S.C. 1952 ed., Sec. 23(a)); Internal Revenue Code of 1954, Sec. 162.

[10] As stated in *Flowers, supra,* pp. 469-470, the predecessor of Section 162(a) (2) was "to be contrasted with" the predecessor of Section 262 and, "in light of the interpretation given [the former] * * * [by] Treasury Regulations", commuting expenses are not deductible.

1945); see *Helvering* v. *Winmill*, 305 U.S. 79 (1938); *Cammarano* v. *United States*, 358 U.S. 498, 510-511 (1958); *Commissioner* v. *South Texas Co.*, 333 U.S. 496, 501 (1948).

In accord, we submit, with the foregoing principles, the District Director allowed the taxpayer to deduct all of his transportation expenses incurred in traveling *between* various pilotage assignments, whether their locations were along the central Seattle waterfront or elsewhere. Further, having determined that Seattle was the taxpayer's principal place of business, the District Director allowed him to deduct all of his transportation expenses incurred in traveling between his home and pilotage assignments ports *other than Seattle* [11]. The only expenses in issue, then, are those incurred in commuting between the taxpayer's residence and Seattle, which the Commissioner disallowed on the ground that they were non-deductible personal expenses. (I-R. 26, 29; II-R. 17-19, 21, 29-30, 46-48, 60, 62.)

The taxpayer—who did not contend in the District

---

[11] Such expenses are deductible because they were incurred on trips taking the taxpayer away from Seattle. When a taxpayer has (*Steinhort* v. *Commissioner, supra*, p. 504) "two or more established places of business, all costs of transportation between them * * * [are] ordinary and necessary business expense[s]" primarily because a taxpayer cannot be expected to avoid such expenses by moving away from his principal place of business—here, Seattle. In that sense, they are required by the exigencies of his business. *Sherman* v. *Commissioner*, 16 T.C. 332 (1951); *Chandler* v. *Commissioner*, 226 F. 2d 467 (C. A. 1st, 1955); see *Wright* v. *Hartsell*, 305 F. 2d 221, 225 (C. A. 9th, 1962).

Court and does not contend in his brief here that any port city other than Seattle was his principal place of business—contends that his residence was his principal place of business because he maintained an office there in which he carried on certain business study activities. Because of that residential office, the taxpayer contends that he is not a commuter at all, except insofar as he walks (Br. 20) "from any other part of his home to his office". Accordingly, unlike most other working taxpayers who must bear the cost of commuting to work without tax deduction therefor, the taxpayer contends that all costs incurred in leaving his residence and traveling to and from work are deductible[12]. We contend that the District Court's finding that the expenses in question are non-deductible commuting expenses is correct because the record clearly indicates that Seattle was the taxpayer's principal place of business[13].

Here, taxpayer himself admitted (II-R. 26) that during the years involved, he went "to (the) docks in

---

12 As indicated, *supra*, taxpayer has been allowed all transportation expenses incurred in traveling between assignments and between his home and assignment port cities other than Seattle. See fn. 11, *supra*.

13 Since the primary question in this case—whether taxpayer's principal place of business was Seattle, as we contend and as the District Director contended below, or the taxpayer's residential office, as he contends—is essentially factual (*United States* v. *Mathews*, 332 F. 2d 91 (C. A. 9th, 1964); *Peurifoy* v. *Commissioner*, 358 U. S. 59 (1958); *Green* v. *Commissioner*, 35 T. C. 764 (1961), affirmed, 298 F. 2d 890 (C A. 6th, 1962)). the District Court's holding sustaining the Director's position is subject to the clearly erroneous rule (*Commissioner* v. *Duberstein*, 363 U.S. 278 (1960)).

the Seattle area" "around 50" percent of the time to perform his pilotage assignments[14]. That testimony is supported by the general pattern of pilotage volume in the Puget Sound area, most of which, as taxpayer testified, is performed in the Seattle port area. (II-R. 67.[15]) Further, Seattle was centrally located among taxpayer's assignments. (Ex. 2; II-R. 10, 64-67.)

Taxpayer received virtually all of his income from the Pilots' Association in Seattle. (I-R. 27; II-R. 49-50.) Further, it was in Seattle that the Association had extensive facilities from which the dispatcher notified taxpayer of his assignments and in which it carried on the vital business of marketing pilotage services and billing ship owners upon which the livelihood of its members depended. (II-R. 23, 25, 30, 49-54.) Although the dispatcher in Seattle often notified taxpayer by telephone of assignments at his home, he was

---

14 Other testimony by taxpayer, admittedly a "guess", could possibly be construed to conflict with his testimony that he performed about fifty percent of his work at the Seattle port area. (II-R. 18, 28.) However, as already stated herein, taxpayer has not contended and does not contend that any port city other than Seattle was his principal place of business. Moreover, to support any such contention, the taxpayer would presumably have, or could obtain from the Association, records to show where his assignments were performed during the years involved and, for that matter, during other years. His failure to introduce such evidence can only be taken to mean that such evidence would not support such a contention. See *Meier* v. *Commissioner,* 199 F. 2d 392, 396 (C. A. 8th); 9 Mertens, Law of Federal Income Taxation (Rev.), Sec. 50.59, fn. 88.

15 Indeed, at least by 1962, the Pilot's Association reimbursed its members, in specified amounts, for travel expenses incurred on pilot assignments to piers other than those located in Seattle. (II-R. 60-67.) The size of that allowance is apparently based upon the distance a particular pier is located from Seattle (Ex. 11), in recognition of the extraordinary costs incurred by pilots in traveling away from Seattle to work because most of the work is performed in Seattle (II-R. 66-67).

not required by his business to be at his home to receive assignments—even when his name was placed at the top of the duty roster administered by the Association[16]. Instead, taxpayer could be away from his home and his wife could notify the Association of his whereabouts or, if both he and his wife left their home, he could directly notify the Association. This he also sometimes did when finishing another assignment (without calling home). (II-R. 50-51, 56.)

Taxpayer strives to diminish the significance of the Pilots' Association[17] and contends that he is an independent contractor. These contentions, however, do not support his argument that his office was his principal place of business[18]. In reality, taxpayer's office is no different from those found in the homes of many other professional people.

Aside from the five or ten-minute task of prepar-

---

16 When a pilot's name came to the top of the roster, he was on call to furnish services twenty-four hours a day. (I-R, 28, 29; II-R. 25, 49.)

17 On its partnership returns for the taxable years in question, the Association labels itself a voluntary association of sole proprietors. (Exs. 8, 9.) A reading of the Association's by-laws (Ex. 10), however, discloses that Article III, concerning admission to membership, provides for an investigation of prospective members to assure their desirability as business associates and Articles XI and XII, dealing with the duties of the trustees and president of the Association, clothe them with powers usually found in officers of a going concern. Article XXII requires a resigning or retiring member to surrender his state pilot license and enter into a convenant not to compete for five years (See also II-R. 25, 49-50.)

18 We concede that taxpayer may be an independent contractor. But the independent contractor-employee dichotomy, developed in an unrelated area of law, is irrelevant to the problem of establishing taxpayer's principal place of business. *Heuer* v. *Commissioner*, 32 T. C. 947, 952 (1959); *Steinhort* v. *Commissioner*, 335 F. 2d 496, 499 (C. A. 5th, 1964).

ing a dues card for each assignment, which he sometimes also prepared aboard ship (II-R. 54-55), taxpayer states that he spent time in his office studying hydrographic literature. (II-R. 17-18; see also II-R. 13-16, 20, 25-26, 33, 36-37, 39; Ex. 5). Not only is much of this same literature found in the Association's Seattle office (II-R. 52-54) and in its Puget Sound Pilots House, where the taxpayer sometimes studied (II-R. 57, 59), but the information contained in the literature is directly related to taxpayer's professional qualifications (Ex. 7, pp. 9-11; II-R. 12-16, 18, 20). As he admits, a pilot, regardless of his geographic area, must be aware of the changes in his pilotage district. (II-R. 33.) In essence, the taxpayer's office activities amount to no more than a professional person's maintenance of his skills by keeping abreast of current literature. Certainly, many doctors, lawyers, and other professional people, whose livelihoods are earned at their downtown offices or similar locations to which they commute from their homes, must also keep abreast of their professional literature by studying at home. That does not, however, convert their home studies into their business headquarters to allow them the tax deduction claimed here. Similarly, here, in the light of the circumstances disclosing that taxpayer earned his pilotage income substantially at the central Seattle waterfront and, to a lesser extent, at other ports, and

the pilotage business activities carried on by the Association in Seattle on his behalf, his study activities in his residential office are insufficient to convert it from a professional person's study into his principal place of business. *Steinhort* v. *Commissioner*, 335 F. 2d 2d 496 (C.A. 5th, 1964); *Heuer* v. *Commissioner*, 283 F. 2d 865 (C. A. 5th, 1960), affirming *per curiam* 32 T.C. 947 (1959); cf. *Flowers* v. *Commissioner*, decided August 7, 1944 (P-H Memo T.C., par. 44-263), reversed, 148 F. 2d 163 (C. A. 5th, 1945), reversed, 326 U.S. 465 (1946); *Green* v. *Commissioner*, 35 T.C. 764 (1961), affirmed, 298 F. 2d 890 (C. A. 6th, 1962).

B. *The Fifth Circuit's decisions in Heuer v. Commissioner and Steinhort v. Commissioner support the position of the District Director here; the District Court decision in Hulme v. United States is distinguishable and, moreover, may be erroneous*

There are apparently only two appellate decisions —both by the Fifth Circuit—directly involving the deductibility of transportation expenses incurred by ship pilots in traveling between their residences and their pilotage assignment ports. In *Heuer v. Commissioner*, 283 F. 2d 865 (1960), affirming *per curiam* 32 T.C. 947 (1959), and *Steinhort* v. *Commissioner*, 335 F. 2d 496 (1964), affirming and remanding a decision of October 2, 1962 (P-H Memo T.C., par.

62, 233), the Fifth Circuit held, in accord with our position here, that transportation expenses incurred on trips between assignment areas and between taxpayers' residences and ports outside of the port area constituting the taxpayers' regular or principal places of work were deductible business expenses (see *Steinhort* v. *Commissioner*, *supra*, pp. 498, 502, 504-505), but that expenses incurred in commuting between their residences and their principal places of work were non-deductible personal expenses (*Steinhort*, *supra*, p. 504). The facts in those cases, we submit, are virtually identical to the facts in the instant case.

Like the taxpayer here, the pilots in *Heuer* and *Steinhort* belonged to pilots' associations which gave them assignments both in the port cities where they performed a substantial portion of their piloting and also in other more remote ports in their general geographical pilotage areas. In those cases the taxpayers were often required to travel considerable distances to carry out their assignments. Like the taxpayer here, when traveling between his residence and Seattle, the pilots in *Heuer* and *Steinhort* customarily reported to their job assignments by private automobile—in those cases usually because of the inadequacy or inconveni-

ence of public transportation[19]. In *Steinhort*, the Fifth Circuit, after allowing the deduction of the expenses for the remote port trips and between-assignments trips, pointed out (335 F. 2d, p. 503) that the transportation expenses incurred in traveling between residence and business city, like those involved here, were not peculiar to pilots, but rather characterized a way of life for millions of Americans, who daily commute between their homes in the suburbs and their jobs in the city. A pilot's comparable commuting expenses, reasoned the court, are also non-deductible personal expenses.

The *Heuer* and *Steinhort* decisions, we submit, are correct and should be followed here. Section 162(a) must be read in conjunction with the principle set forth in Section 262, Appendix, *infra*, provides that "no deduction shall be allowed for personal, living, or family expenses." The well-established rule that expenses incurred in commuting between residence and established place of business are not deductible is

---

[19] While taxpayer in the instant case testified that there was inadequate public transportation for his travel beween his residence and some ports other than Seattle (II-R. 27) (which trips are not in issue here), there is no evidence here that when taxpayer chose to live within the Seattle area, as he did during the years involved when he lived in North King County and after he moved from Camano Island to Edmonds (II-R. 16-17, 66; Ex. 2), he did not have suitable public transportation between his home and the Seattle piers. In any event, while public transportation in many urban areas may be less efficient than what many taxpayers consider desirable and, therefore, such taxpayers choose to commute by private automobile from their suburban residences to the city (as, in some cities, the majority of commuters do), that fact obviously does not justify the deduction of such typical personal expenses.

based on the making of a reasonable accommodation between the policies of Sections 162(a) and 262 in the light of rational, practical, and equitable considerations. Many—if not most—taxpayers either cannot, or for business, social, and family reasons, choose not to, live next to their work and must, therefore, incur some commuting expenses just as taxpayers must—without tax effect under Section 162(a)—change their business locations and be clothed and housed in appropriate fashion, if they are to pursue their business effectively [20]. Today, millions of taxpayers commute

---

20 Amounts paid for daily meals, lodging, clothing, and a considerable arra of other expenses that may be essential to life and, indeed, essential to earnin a living, do not serve to reduce "gross income" for tax purposes. For example a given corporation may require its salesmen or executives to don a clean shir every day, to wear expensive suits, to drive a certain make of automobile, o even to live in a certain fashionable suburb. Even though the employee prove that but for his employer's requirements he would not have spent as much o his clothes, car or home, no part of these costs is deductible. The costs incurre by an employee in moving to a new business location are not deductible unde Section 162(a) even though no part of the expenses would have been incurre if the taxpayer were not pursuing his business. *United States* v. *Woodall*, 25 F. 2d 370, 373 (C. A. 10th, 1958), certiorari denied, 358 U.S. 824. Accor *Koons* v. *United States*, 315 F. 2d 542, 544 (C. A. 9th, 1963). (Section 217 the 1954 Code, as added by Section 213 of the Revenue Act of 1964, P.L 88-272, 78 Stat. 19, modified the holdings in *Woodall* and *Koons*, *supra*, b allowing the deduction of certain direct moving expenses. Note, however, th even where the transfer is made solely at the behest of the taxpayer's er ployer, Section 217 does not provide for the deduction of many of the indire expenses of moving—e.g., temporary living expenses at the new locatio expenses incurred in house or apartment hunting, and expenses incurred trips made for the purpose of selling the old residence—none of which wou have been incurred if the taxpayer had not been pursuing his trade or busine by changing business locations. See H. Rep. No. 749, 88th Cong., 2d Ses p. A58 (1964-1 Cum. Bull. (Part 2) 125, 306); *England* v. *United States*, 3 F. 2d 414 (C. A. 7th, 1965), certiorari denied, 382 U. S. 986 (1966).) Similar a loss incurred on the sale of a residence occasioned by the transfer of employee to a new business location—even where the transfer is made sol at the behest of his employer—does not reduce his taxable income. *Bradley Commissioner*, 324 F. 2d 610 (C. A. 4th 1963), affirming 39 T.C. 652 (1963 *Pederson* v. *Commissioner*, 46 T.C. 155 (1966); *Loflin* v. *Commissioner* (W. Tenn.), decided March 8, 1967 (19 A.F.T.R. 2d 1091); *Hayes* v. *Commission* decided June 8, 1966 (P-H Memo T.C., par. 66,123). Although expenditures this kind may be helpful in furthering the taxpayer's business, the relationsh between such expenditures and the taxpayer's business is too intangible and

between their suburban residences and their business areas located downtown or elsewhere, often in the suburbs. Some use public transportation; others find it either practically necessary or, at least, substantially more convenient—in the light of available public transportation and the costs involved—to commute by automobile, often considerable distances. Regardless of the method of transportation chosen or distances travelled, however, the well-established rule that such expenses are non-deductible "personal"—not "business"[21]—expenses is clearly justified by the need to treat such similarly situated taxpayers equally. *Steinhort* v. *Commissioner*, 335 F. 2d, pp. 503-505[22].

The taxpayer here relies extensively on *Hulme* v. *United States* (N.D. Calif.), decided June 3, 1965 (16

---

mote to qualify them as Section 162(a) "ordinary and necessary expenses * * * incurred * * * in carrying on any trade or business * * *." In the end, they are more accurately described as "personal, living, or family expenses" which the Code specifically makes non-deductible.

[21] Such commuting expenses are not (Section 162(a) (2)) "incurred * * * *in carrying on* any trade or business (emphasis supplied) but, instead, are incurred so that a taxpayer may travel to that place where he carries on his business. Cf. *United States* v. *Woodall*, 255 F. 2d 370, 373 (C. A. 10th, 1958), and *Koons* v. *United States*, 315 F 2d 542, 544 (C. A. 9th, 1963).

[22] To be sure, in certain exceptional situations, usually involving remote, uninhabitable, and temporary job locations, transportation expenses somewhat similar to expenses incurred in commuting between residence and established place of business have been held deductible, primarily on the grounds that they were unavoidable and were incurred in what was actually business travel. See *Steinhort* v. *Commissioner*, 335 F. 2d, pp. 503-504. But obviously it would be administratively impossible to determine fairly which suburban or urban commuters have located their homes as close as is practically possible to their work locations and have chosen the most economical means of commuting, whether bus, train, or automobile, so as to allow them to deduct their commuting expenses, while not allowing other similarly situated commuters to deduct theirs. Moreover, in the instant case, the taxpayer has not attempted to prove either that he could not have lived in, or closer than he did to, Seattle. See fn. 19, *supra*.

A.F.T.R. 2d 5084), where apparently all of a ship pilot's transportation expenses were held to be deductible on the ground that, on the facts in that case, the taxpayer's home constituted his principal place of business. The taxpayer here points out that, like the taxpayer in *Hulme*, he maintained an office in his home, whereas that point was not developed in either the *Steinhort* or the *Heuer* case [23]. The taxpayer, however, overlooks the significance of the office in *Hulme*—and the insignificance of his office here—in the light of the surrounding circumstances in each case which distinguish *Hulme* from the instant case.

In *Hulme*, taxpayer was not a member of a pilots' association and, therefore, carried on at his residence essentially the same business activities as are carried on by such an association on behalf of its members at its offices. By contrast, in the instant case, taxpayer used his office essentially only for professional study (I-R. 28; II-R. 17-18; see also II-R. 13-16, 20, 25-26, 33, 36-37, 39; Ex. 5.) All of the activities that Hulme carried on in his office—soliciting business, billing and the record—keeping connected therewith—were carried on here not by the taxpayer in his residential office but by his Association in Seattle. (I-R. 28; II-R. 23, 25, 30, 49-54.) Indeed, whereas Hulme, operating

---

23 Presumably, however, the taxpayers in *Heuer* and *Steinhort* carried on their hydrographic studies somewhere, possibly at their residences. (See II-R. 32-33.)

alone, had to be at his residential office to receive assignments—which could be requested at any time and often on short notice—taxpayer here did not have to be at his residence to receive work; it was sufficient that he get in contact with the Association wherever he happened to be. (II-R. 50-51, 56.) Further, while the taxpayer here testified (II-R. 26) that approximately fifty percent of his work was performed at the central Seattle waterfront[24]—an area covering a distance of only three and one-half or four miles (I-R. 29), at issue in *Hulme* was seventy-three percent of the taxpayer's expenses incurred in traveling to and from such widely separated ports as Redwood City, San Francisco, Martinez, and Stockton, and approximately eighty percent of the assignments performed by the taxpayer were apparently spread out over the Stockton-San Francisco port areas. Under the circumstances in that case, then—where, unlike the instant case, expenses for travel to widely separated ports were at issue and the taxpayer, not belonging to a pilot's association, arguably had his business headquarters at his residence—the court may have concluded that no one city or port area constituted the taxpayer's principal place of business. But, in the instant case, essentially the taxpayer only studied at his residential office because the Association, for the benefit of its members,

---

24 See also fns. 15 and 16, *supra*, and accompanying text.

carried on the necessary commercial aspects of the pilotage business at its Seattle office, and taxpayer performed approximately fifty percent of his assignments at Seattle, where he derived all of his income from the Association. *Hulme*, then, is distinguishable from the instant case[25].

The cases relied on by taxpayer (Br. 13-14) other than *Hulme*, discussed *supra*, are distinguishable on their facts from the instant case. *Rice* v. *Riddell*, 179 F. Supp. 576 (S. D. Calif., 1959), involved a musician who had to carry his large musical instruments with him to constantly changing and temporary places of assignment (see Rev. Rul. 63-100, 1963-1 Cum. Bull. 34); unlike the taxpayer here, he had no established principal place of business. *Crowther* v. *Commissioner*, 269 F. 2d 292 (C.A. 9th, 1959), and *Mathews* v. *Commissioner*, 310 F. 2d 98 (C.A. 9th, 1962), involving remote, uninhabitable and temporary job locations, are distinguishable for much the same reason as is the *Rice* case, *supra*.

Taxpayer's suggestion (Br. 21-22; see also Br. 14-15) that there is a "conflict" between this Court's decisions in *Crowther* and *Mathews*, *supra*, and those of the Fifth Circuit in *Heuer* and *Steinhort*, *supra*, is

---

25 If, however, this Court should not consider *Hulme* distinguishable, then we contend that it was wrongly decided and that this Court should disregard it and follow the well-reasoned opinion of the Fifth Circuit in *Steinhort*, which approved its prior decision in *Heuer*.

without merit. In *Heuer*, the Fifth Circuit was undoubtedly aware of the *Crowther* decision; in *Steinhort* (335 F. 2d, pp. 504-505) the court cited both *Crowther* and *Mathews* with apparent approval, noting that it agreed with this Court's definition of (Section 162(a)(2)) "home" in those cases, and held that expenses incurred in commuting between "home", as there defined, and the taxpayer's established place of business—a common expense incurred by many taxpayers regardless of their particular occupations without tax deduction therefor—were non-deductible personal expenses. The Fifth Circuit in *Steinhort* pointed out that the well-established rule that such commuting expenses are not deductible tended to achieve equality of treatment among similarly situated taxpayers (335 F. 2d, p. 503) a fundamental goal of our system of taxation. *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180, 185-186 (1957)[26]. As stated in *Steinhort*,

---

[26] Congress in 1958 emphasized that equality of treatment of similarly situated taxpayers is a basic objective in the context of business-related travel expenses. In that year, Congress repealed Section 120 of the 1954 Code (see Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, Sec. 3), which had allowed state police to exclude from their income $5 daily meal allowances. The Senate Finance Committee gave as one of its reasons (S. Rep. No. 1983, 85th Cong., 2d Sess., P. 14 (1958-3 Cum. Bull. 922, 935)):

> * * * this exclusion is inequitable because there are many other individual taxpayers whose duties also require them to incur subsistence expenditures regardless of the tax effect. Subsistence expense incurred by taxpayers generally in the performance of services as employees while away from home are deductible * * *.
>
> To bring the tax treatment of subsistence allowances for police officials in line with the treatment of such allowances in the case of other taxpayers, your committee's bill * * * repeals the section of present law providing this $5 exclusion.

supra, involving facts virtually identical to those here (335 F. 2d, p. 503):

> Deeply ingrained in the whole tax structure —memorialized now by literally hundreds of tax rulings, Tax and other Court decisions * * * is the basic proposition that the cost of going to and from home and an established place of business is a non-deductible personal expenditure.
>
> * * * its predominant * * * grace is a sort of rough equality among all the millions of taxpaying, income-earning Americans who go—not as in scriptural days down to the sea in ships—but who go to and from their homes and their place of work.

In conclusion, taxpayer has failed to show that the District Court's rejection of his residential office as his principal place of business was clearly erroneous. Rather, it was Seattle where taxpayer performed a substantial portion—approximately fifty percent—of his assignments as a pilot, where he derived virtually all of his income, and where the Pilots Association, for the benefit of its members, carried on virtually all of the commercial aspects of the pilotage business. Taxpayer, for personal reasons, chose to maintain his residence away from Seattle, his principal place of business. Accordingly, the commuting costs incurred by taxpayer on his trips to and from Seattle were non-deductible personal expenses.

CONCLUSION

For the reasons stated above, the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

MITCHELL ROGOVIN,
Assistant Attorney General.
LEE A. JACKSON,
EDWARD LEE ROGERS,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

Of Counsel:

EUGENE G. CUSHING,
United States Attorney.
ALBERT E. STEPHAN,
Assistant United States Attorney.

OCTOBER, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated:..... day of....., 1967.

_____
United States Attorney

APPENDIX

Internal Revenue Code of 1954:

SEC. 62 ADJUSTED GROSS INCOME DEFINED.

For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

(1) *Trade and business deductions.*—The deductions allowed by this chapter (other than by part VII of this subchapter) which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee.

(2) *Trade and business deductions of employees.*—

(C) *Transportation . . expenses.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

* * *

(26 U.S.C. 1964 ed., Sec. 62.)

SEC. 162. TRADE OR BUSINESS EXPENSES

(a) *In General*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *

* * *

(26 U.S.C. 1964 ed., Sec. 162.)

SEC. 262. PERSONAL, LIVING AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

(26 U.S.C. 1964 ed., Sec. 262.)

Treasury Regulations on Income Tax (1954 Code):

§ 1.62-1 *Adjusted gross income.*

* * *

(g) Transportation expenses paid or incurred by an employee in connection with performance by him of services for his employer are deductible from gross income under part VI in computing adjusted gross income. "Transportation", as used in section 62 (2) (C), is a narrower concept than "travel", as used in section 62 (2) (B), and does not include meals and lodging. The term "transportation expense" includes only the cost of transporting the employee from one place to another in the course of his employment, while he is not away from home in a travel status. Thus, transportation costs may include cab fares, bus fares, and the like, and also a pro rata share of the employee's expenses of operating his automobile, including gas, oil, and depreciation. All transportation expenses must be allowable ex-

penses under part VI (section 161 and following), subchapter B, chapter 1 of the Code, as ordinary and necessary expenses incurred during the taxable year in carrying on a trade or business as an employee. Transportation expenses do not include the cost of commuting to and from work; this cost constitutes a personal, living, or family expense and is not deductible. (See section 262.)

* * *

(26 C.F.R., Sec. 1.62.1.)

§ 1.162-2 *Traveling expenses.*

(e) Commuters' fares are not considered as business expenses and are not deductible.

* * *

(26 C.F.R., Sec. 1,162-2.)

§ 1.262-1 *Personal, living, and family expenses.*

* * *

(a) *In general.* In computing taxable income, no deduction shall be allowed, except as otherwise expressly provided in chapter 1 of the Code, for personal, living, and family expenses.

(b) *Examples of personal, living, and family expenses.* Personal, living, and family expenses are illustrated in the following examples:

* * *

(5) Expenses incurred in traveling away from home (which include transportation expenses, meals, and lodging) and any other transportation expenses are not deductible unless they qualify as expenses deductible under section 162, * * *

* * *

(26 C.F.R., Sec. 1.262-1.)